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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. —

J. L. ENOCHS, DISTRICT DIRECTOR OF INTERNAL REVENUE, PETITIONER

v.

WILLIAMS PACKING & NAVIGATION CO., INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Solicitor General, on behalf of the District Director of Internal Revenue, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the District Court (Appendix B, *infra*, pp. 28–42) is reported at 176 F. Supp. 168. The opinion of the Court of Appeals (Appendix A, *infra*, pp. 11–26) is reported at 291 F. 2d 402.

JURISDICTION

The judgment of the Court of Appeals was entered on June 14, 1961. (Appendix A, *infra*, p. 27). By order of the Chief Justice on September 11, 1961, the

time for filing a petition for certiorari was extended to October 12, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the District Court, in light of the prohibition of Section 7421(a) of the 1954 Internal Revenue Code, had jurisdiction permanently to enjoin the District Director from collecting the social security and unemployment taxes involved, where there was no showing that the taxes were illegal exactions within the meaning of this Court's decision in *Miller* v. *Nut Margarine Co.*, 284 U.S. 498.

STATUTE INVOLVED

Internal Revenue Code of 1954 (26 U.S.C., 1958 ed.):

> SEC. 7421. PROHIBITION OF SUITS TO RESTRAIN ASSESSMENT OR COLLECTION.
>
> (a) *Tax.*—Except as provided in sections 6212 (a) and (c), and 6213(a), no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court.
>
> * * * * *

STATEMENT

This case originated upon the filing of a complaint (R. 2–8) by the Williams Packing & Navigation Co., Inc. (taxpayer) for an injunction to restrain the District Director of Internal Revenue, Mississippi, from collecting social security and unemployment taxes in

the total amount of $41,568.57, which had been assessed against it for taxable periods during the years 1953, 1954 and 1955. (R. 10-11.) The assessments resulted from the determination of the Commissioner of Internal Revenue that the captains and crewmen who performed services as fishermen aboard trawlers which were owned or leased by the taxpayer were employees of the taxpayer within the meaning of the term "employee" as defined in Sections 1426 and 1607 of the Internal Revenue Code of 1939, and the corresponding provisions (Sections 3121 and 3306) of the Internal Revenue Code of 1954.

The district court granted a permanent injunction (R. 729, 730) upon its finding that (Appendix B, *infra*, p. 36):

> if the levy had been made upon the assets of the corporation it would have wrecked the corporation and thrown it into bankruptcy, as it did not have and does not have assets with which to pay the taxes and not sufficient assets with which it could have negotiated a loan to pay the tax

and upon its further finding and legal conclusion that there was no employer-employee relationship between taxpayer and the captains and crews of the ships involved (Appendix B, *infra*, p. 38).

The Court of Appeals affirmed (Appendix A, *infra*, p. 20). Judge Rives, dissenting, noted that the holding of the majority was in direct conflict with an Eighth Circuit decision and pointed out (App. A, *infra*, p. 24) that the rationale of this Court's decision in *Miller*

v. *Nut Margarine Co.*, 284 U.S. 498, "cannot be extended to bring within some supposedly implied exception cases like the present one without emasculating the prohibition" against injunctions to restrain the collection of taxes imposed by Section 7421(a) of the Internal Revenue Code.

REASONS FOR GRANTING THE WRIT

The decision of the Fifth Circuit renders ineffectual the broad statutory prohibition of suits "for the purpose of restraining the assessment or collection of any tax" 26 U.S.C. 7421(a). It is inconsistent with the decision of this Court in *Miller* v. *Nut Margarine Co.*, 284 U.S. 498, which narrowly limited the field of exceptions to the parallel provisions of an earlier statute,[1] and it threatens to create a substantial area of disorder in the administration of the revenue acts. Finally, the case is in direct conflict with the Eighth Circuit's decisions in *Kaus* v. *Huston*, 120 F. 2d 183, and *Missouri Valley Intercollegiate Athletic Ass'n* v. *Bookwalter*, 276 F. 2d 365, and conflicts in principle with the Seventh Circuit's decisions in *Mensik* v. *Long*, 261 F. 2d 45, and *Homan Mfg. Co.* v. *Long*, 242 F. 2d 645.

Section 7421(a) of the Internal Revenue Code of 1954 commands in the clearest words that Congress could choose that "no suit for the purpose of restraining the assessment or collection of any tax

[1] R.S. 3224, the predecessor to present Section 7421(a).

shall be maintained in any court.'"[2] Embodied in this sweeping prohibition is the congressional judgment that the complexities of administration of the revenue laws are manageable only if there is a uniform system of review of asserted tax liabilities. The cardinal principle of this uniform system for almost a century has been the general rule expressed by Section 7421(a)—that the government may assess and collect a contested tax and the taxpayer's remedy, if he believes assessment and collection were improper, is to bring an action for recovery of the payment.[3]

Where Congress thought it necessary to limit this general rule, it provided an explicit exception to the clear statutory command. Section 7421 itself refers to an exception for timely petitions to the Tax Court.

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[2] This provision first became part of the federal tax system in 1867. Section 10 of the Act of March 2, 1867, c. 169, 14 Stat. 471, 475, amended Section 19 of the Act of July 13, 1866, c. 184, 14 Stat. 152, by the addition of the phrase "And no suit for the purpose of restraining the assessment or collection of tax shall be maintained in any court." Section 19 set forth the conditions under which suits might be maintained for the refund of taxes alleged to have been erroneously assessed. In the Revised Statutes the phrase added in 1867 was modified slightly and became Section 3224: "No suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court." Section 3653(a) of the 1939 Code and Section 7421(a) of the 1954 Code are identical to that section except for the addition of provisions relating to cases pending before the Tax Court, not germane here.

[3] See *Cheatham* v. *United States*, 92 U.S. 85, 89; *State Railroad Tax Cases*, 92 U.S. 575, 613; *Snyder* v. *Marks*, 109 U.S. 189, 192, 193.

Except in cases where the Secretary of the Treasury or his delegates believes that assessment or collection of a deficiency will be jeopardized by delay,[4] no assessment or collection of a deficiency in an income, estate, or gift tax is to be made until after there is a final decision of the Tax Court upon any timely petition for redetermination that may have been filed by the taxpayer.[5] Thus, in the case of these taxes, Congress created a statutory right to a judicial determination of liability prior to payment. In the case of social security and unemployment taxes, however, Congress made no exception to the right of the government to collect the tax before any issue of liability should be adjudicated. Thus, Section 7421 applies with full force to bar any "suit for the purpose of restraining the assessment or collection of any tax."

In addition to the explicit statutory exception for Tax Court proceedings, this Court, in *Miller* v. *Nut Margarine Co,, supra,* recognized another narrowly limited occasion for suits restraining the assessment or collection of a tax.[6] The Court, finding the government's determination of tax liability "arbitrary and capricious," stated that a "valid oleomargarine tax could by no legal possibility have been assessed," and therefore concluded that enforcement of the Act

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[4] See Section 6861.

[5] Section 6213.

[6] Justices Brandeis and Stone dissented on the ground that the broad prohibition of the statute "has been consistently applied as precluding relief, whatever the equities alleged." 284 U.S. at 511.

would be "arbitrary and oppressive."[7] On the basis of these findings of what the Seventh Circuit has described as "administrative caprice"[8]—plus a showing of "special and extraordinary circumstances sufficient to bring the case within some acknowledged field of equity jurisprudence"[9]—the Supreme Court affirmed the granting of equitable relief despite Section 7421.

In the present case the Fifth Circuit has decided that in the presence of equitable considerations the assessment and collection of a tax can be enjoined whenever a tax liability is erroneously asserted, whether or not the assertion is, in any other sense, "illegal." There is no basis for a finding of administrative caprice or of an arbitrary and oppressive assertion of tax liability where none could possibly lie. The record and issues in the present case pose questions of law and fact which could be decided only after a full trial, which are subject to reasonable disagreement, and which indisputably were argued by the government in complete good faith. The effect of the decision below is, therefore, to reverse the rule of payment prior to suit and to substitute a right to a

[7] 284 U.S. at 508, 510. The facts in the *Nut Margarine* case showed that the attempt to collect the tax was in defiance of three district court adjudications determining that the product involved was not taxable; that a Treasury Decision had declared the product nontaxable; that the taxpayer had been advised by the Commissioner that its product would not be taxable; and that no effort was being made to impose a similar tax upon identical products being marketed in the same area.

[8] *Homan Mfg. Co.* v. *Long.*, 242 F. 2d 645, 653.

[9] 284 U.S. at 509.

complete judicial determination of tax liability prior to payment, whenever the taxpayer makes a showing of hardship.

It is the government's position that the *Nut Margarine* exception to Section 7421 is limited to situations where the assessment is capricious and arbitrary. If the exception is stretched to include all bona fide contests as to liability, Section 7421(a) is without rational content. The Eighth Circuit has adopted this position in a decision in direct conflict with the decision of the court below. In *Kaus* v. *Huston*, 120 F. 2d 183, the taxpayer contended, as in the present case, that social security and unemployment taxes could not be legally assessed against him for he was only the lessor of taxicabs to independent operators and not the employer of the drivers. The Collector of Internal Revenue argued, as in the present case, that considering the full factual context of the relation between the taxpayer and the drivers, the taxpayer was the employer of the drivers within the meaning of the tax provisions. The Eighth Circuit denied injunctive relief on the ground that (120 F. 2d at 185):

> The assessments are for taxes, and not for exactions in the guise of taxes. The appellant may not owe them, but that does not change their nature, nor is nonliability a special or extraordinary circumstance. This case presents the ordinary situation of a taxpayer resisting payment of taxes which he believes that he does not owe. * * * [10]

[10] The Eighth Circuit has more recently reaffirmed its position in *Missouri Valley Intercollegiate Athletic Ass'n* v. *Bookwalter*, 276 F. 2d 365 (withholding and social security taxes).

For the same reason, the Seventh Circuit has also denied injunctive relief in *Mensik* v. *Long*, 261 F. 2d 45, and *Homan Mfg. Co.* v. *Long*, 242 F. 2d 645.

This conflict among the circuits involves a frequently recurring question of law which only the Supreme Court can finally resolve.[11] Certiorari should be granted for this purpose as well as to reestablish that uniformity of procedure for contesting bona fide assertions of tax liability which is the clear intent of Section 7421(a) and this Court's *Nut Margarine* decision.

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition for a writ of certiorari should be granted.

ARCHIBALD COX,
Solicitor General.
JOHN B. JONES, JR.,
Acting Assistant Attorney General.
MEYER ROTHWACKS,
GEORGE F. LYNCH,
Attorneys.

OCTOBER 1961.

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[11] Five other injunction suits involving the same issue on the merits as in the present case are pending in the Southern District of Mississippi alone. *De Jean Packing Co.* v. *Enochs*, No. 2116; *Taltavull Shrimp & Oyster Co.* v. *Enochs*, No. 2695; *Mavar Shrimp & Oyster Co.* v. *Enochs*, No. 1952; *Victory Packing Co.* v. *Enochs*, No. 2820; *C. C. Co.* v. *Enochs*, No. 2069.

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 18272

J. L. ENOCHS, DISTRICT DIRECTOR OF INTERNAL REVENUE, APPELLANT, *v.* WILLIAMS PACKING & NAVIGATION CO., INC., APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

(June 14, 1961)

Before RIVES, CAMERON AND JONES, *Circuit Judges.*

CAMERON, *Circuit Judge:* This appeal presents two questions: whether fishermen carrying on their occupation of catching shrimp and oysters aboard trawlers, owned or leased by Williams Packing & Navigation Company, Inc., taxpayer-appellee, were its employees during the taxable periods involved within the meaning of §§ 1426 and 1607 of the Internal Revenue Code of 1939 and §§ 3121 and 3306 of the Internal Revenue Code of 1954; and whether taxpayer has shown the existence of such extraordinary and unusual circumstances as to warrant the granting of an injunction notwithstanding the prohibitions contained in § 7421(a) of the 1954 Code.

The district court held that each of the questions should be answered in favor of the taxpayer and, after full hearing, denied the Director's claim of $41,568.57, plus statutory interest, assessed against it as Federal

Insurance Contributions and Federal Unemployment Taxes for taxable periods in the years 1953, 1954 and 1955. Its action was taken after an extended hearing, at which it considered the oral testimony of eighteen witnesses and the depositions of three, along with a large number of exhibits the originals of which are before us; and it entered detailed findings of fact and conclusions of law occupying some twenty pages in the record. Its written opinion is reported in 176 F. Supp. pp. 168 et seq.

The opinion was based upon the evidence heard by the court and the consideration of written briefs filed by the parties. It deals in detail with the contentions made by the appellant Director, and we are of the opinion that the findings of fact of the court below, brought forward in part in the opinion, are supported by substantial evidence in the record and that its conclusions of law are sound; and, on the basis of the court's findings and opinion and the brief comments which follow, we affirm the judgment of the court below.

The published opinion deals with all of the questions argued before us,[1] and the trial court's handling of the issues is so clear and complete that we feel that an extended opinion by us is not called for.

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[1] "Appellant asserts that the court below erred in the following respects:

1. In holding that the relationship of employer-employee did not exist between the taxpayer and the fishermen (boat captains and crew members).

2. In holding that taxpayer had no right of control over the fishermen.

3. In holding that the taxes assessed were illegal.

4. In holding that collection of the taxes would 'totally wreck and ruin the corporation.'

5. In holding that collection of the taxes should be enjoined."

A careful reading of the Director's brief shows that the question underlying disposition of the whole case, that is, whether the fishermen were employees of the taxpayer corporation, was one essentially to be resolved from the facts as developed from the large number of witnesses the court heard.[1]

A few excerpts from the court's published opinion will illustrate the accurate grasp which the court below had of the problems before it and the law under which they would be resolved:

> "This case, like so many other cases, depends upon the individual facts as brought out here and not upon methods of other similar concerns engaged in like business. No uniform pattern covering the entire United States can be formulated except where the facts are identically the same. The judgment to be rendered in this case must be determined from the facts of this particular case, including all the exhibits and reasonable inferences therefrom and the conduct of the parties so far as it may have probative force upon the issues. The law must be determined from the Acts of Congress, the judicial interpretations by the courts and the Treasury Regulations * * *
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> "It has been the custom on the Coast of Mississippi since the seafood packing industry started that fishing vessels have operated upon a share or lay basis, but the details of this customary way varied between some of the packers and that is the reason that it is necessary

[1] The Director's contentions with respect to this question embrace these propositions: "* * * The fishermen were subject to taxpayer's right of control, and control was actually exercised; the employee relationship is evidenced by taxpayer's right to discharge the boat captains and crew members; the method of remuneration is not inconsistent with an employer-employee relationship; the parties treated their relationship as that of employer-employee; a realistic application of the common law control test requires the conclusion that the fishermen were employees, rather than independent contractors * * *."

to determine how the corporation in this particular case conducted its business. * * *

"These examples of the authorities simply illustrate the point that each case will be determined by the facts of the particular case and that no general pattern can be established or formulated. The record in the Gulf Coast Shrimpers and Oystermans Association case, supra [5 Cir., 236 F. 2d 668], well demonstrates that fact and the fact that all packers on the Coast of Mississippi do not have identical patterns. * * *"[1]

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[1] The accuracy of these statements of the trial judge is illustrated by recent decisions rendered by the National Labor Relations Board which have been called to our attention. We refer to six decisions and Orders by the Labor Board based upon its published decision and F. Aliote Co., 129 N.L.R.B. No. 6, where, under circumstances similar to those existing in this case, the Labor Board held that the employees on shrimp boats were not employees of the company owning the boats, but of the captains who leased them:

Case No. 23-RC-1542, Independent Fish Co., Inc., Employer, and General Drivers' Etc., Union, Petitioner, Order entered Oct. 5, 1960;

Case No. 23-RC-1538, Doro Benteiro, Employer, and General Drivers and Helpers Local Union No. 657, decided Oct. 6, 1960;

Case No. 23-RC-1550, Sea Garden Corporation, Employer, and General Drivers and Helpers Local Union No. 657, etc., decided Oct. 5, 1960;

Case No. 23-RC-1549, Wilhelm Seafoods, Inc., et al., Employers, and General Drivers and Helpers Union No. 657, decided Oct. 5, 1960;

Case No. 23-RC-1539, Roberto deLuna, Employer, and General Drivers and Helpers Local Union No. 657, decided Oct. 5, 1960.

These decisions have no decisive effect in this case, but serve merely to attest the fact that agencies of the Government are resolving similar issues in a way which is consonant with the trial court's decision here.

The careful analysis of the testimony and application of the cases the Government relied on before the Court below and now relies on before us demonstrate that it fully comprehended the issues of fact involved and the law applicable to them. The conclusion reached by the trial court from the testimony is entitled to the presumption of correctness with which the Federal Rules invest it.

The Director argues earnestly that the injunction was not properly granted in this case. His contention is thus summarized—*each of the two points relating to the action of the court below in deciding a fact issue:*

> "In ruling that the injunction was properly granted, it (the trial court) held, erroneously, (1) that the tax was 'illegal' because the employer-employee relationship did not exist between the taxpayer-corporation and the fishermen, and (2) that to allow the Director to proceed to levy would have brought financial disaster to the taxpayer. • • •
>
> "As this Court said in *United States* v. *Curd*, 257 F. 2d 347, 350, the issuance of any such injunction must be tested in the light of the 'emphatic language' of the statute and the 'limited circumstances' in which, under equitable principles reflected in *Miller* v. *Nut Margarine Co.*, 284 U.S. 498, and cases following it, injunctive relief may be granted despite the statutory prohibition. • • •
>
> "• • • *Basically, the error of the court below lies in its failure to realize* that the taxpayer-corporation and the DeJean partnership, though separate legal entities, were parts of an integrated operation and for all practical purposes, including financial, were merged." [Emphasis added.]

Appellant quotes from the *Curd* case (pp. 350–351) our estimate of the "extraordinary circumstances" which would meet the stringent requirements necessary to support the conclusion that "irretrievable injustice would be done were an injunction not issued." The opinion of the court below shows that the judge carefully considered the authorities relied upon by the Government and others and concluded "as a matter of law that it was appropriate to grant the temporary injunction," and to make it permanent.

Dealing with the relationship between DeJean and the taxpayer, which the Director referred to as basic, and with what the Director characterized as error leading to the wrongful issuance of the injunction, the court below in its opinion said:

> "It * * * is the theory, of the Government that the DeJean Packing Company is able to pay the tax and that because of the relationship of Elmer Williams to the corporation and to the partnership that the corporation had it within its power to require the DeJean Packing Company to pay the tax for it if the corporation be liable. However, as heretofore stated, this contention is not sustained by the evidence. * * *"

Large portions of the evidence in the record and of the Director's brief deal with this relationship, which appellee charged to have encompassed fraudulent transactions and concealments in the dealings between the appellee corporation and the partnership in an effort to escape the exactions here involved. The witnesses, who detailed the circumstances from which an intelligent conclusion as to such a relationship would have to be drawn, were local people, doubtless well known to the judge. He heard them testify and he set forth fully in his findings and the opinion the nature and ingredients of that relationship as he

found them to be. The inferences he drew and the conclusion he reached from the human testimony, the exhibits, and the evidence of customs given by the witnesses included the weighing and assaying of testimony involving subtleties and intangibles which could best be done by one having the "feel" of the case which was possessed by the district judge. The Director's evidence was sharply contradicted, and the trial court doubtless considered that major reliance was placed by the Director on the testimony of one or more witnesses who were embittered by the events attending a strike against appellee. Its decision on this fact question is invested with the presumption of correctness, which an examination of the record does not tempt us to set aside as clearly erroneous.

The trial court's decision on this fact question, treated by appellant throughout as being basic, virtually disposes of the claim that the injunction was not properly granted. Appellant did argue briefly that appellee was able to pay the exaction and sue for refund, relying to a considerable extent on the testimony of strongly biased witnesses to sustain this contention. The trial court's findings * are against appellant and they are clearly supported by the evidence.

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*"I find as a fact that if the levy had been made upon the assets of the corporation it would have wrecked the corporation and thrown it into bankruptcy, as it did not have and does not have assets with which to pay the taxes and not sufficient assets with which it could have negotiated a loan to pay the tax. * * *

"The Government complains of bad faith on the part of the plaintiff and concealment of evidence. The court finds as a fact that the plaintiff was not guilty of any bad faith or any intentional concealment of any records or evidence."

This Court has been diligent in protecting the public revenues against improvident injunctions. The last case coming to our attention is *McDonald* v. *Phinney, Director*, 1961, 285 F. 2d 121. There we affirmed the action of a district judge in refusing to make permanent a temporary injunction which had been issued and in dismissing the complaint under § 7421. In that case the tax involved had been reduced to judgment in the Tax Court on the basis of stipulation between the parties and, more than a year and a half later, the taxpayer filed his action for injunction on the ground that "he lacked sufficient funds to pay the sum alleged to be owing to the government and that to allow the government to collect such sums would be to subject his property to a forced sale by reason of which he would suffer irreparable damage."

In that case, we set forth a good summary of the applicable rule (page 122):

> "We think that the trial court acted properly in dismissing the complaint. Section 7421 clearly prohibits suits to restrain assessment or collection of taxes except in certain cases not relevant to the present inquiry. While it is true that, notwithstanding the statutory prohibition against such suits, they have been allowed under certain circumstances, see, e.g., Miller v. Standard Nut Margarine Co., 284 U.S. 498, 52 S. Ct. 260, 76 L. Ed. 422, they are not permitted when the complaining party asserts *financial hardship and nothing or little more.* State Railroad Tax Cases, 92 U.S. 575, 23 L. Ed. 663; Lloyd v. Patterson, 5 Cir., 242 F. 2d 742; Enochs v. Green, 5 Cir. 270 F. 2d 558; Robique v. Lambert, D.C., 114 F. Supp. 305, affirmed per curiam 5 Cir., 214 F. 2d 3. We think it clear that the facts involved in the instant case necessitate its falling into the latter class of cases, for appellant has failed to show

> the extraordinary circumstances which would justify the issuance of an injunction by the district court. See United States v. Curd, 5 Cir., 257 F. 2d 347; Tomlinson v. Poller, 5 Cir., 220 F. 2d 308, and Darnell v. Thomlinson, 5 Cir., 220 F. 2d 894." [Emphasis added.]

The circumstances relied upon in that case and the cases cited by it fall far short of those found to be present here. The trial court said here, in addition to that quoted *supra:* "As before stated, if the Government had been permitted to execute upon the property and seize and sell it, it would totally wreck and ruin the corporation. The corporation is entitled to continue its existence *because its charter has value and gives it valuable rights in Louisiana,* and as long as it complies with all federal laws it should not be permitted to be destroyed." [Emphasis added.]

A peculiar equity existing in appellee's favor—which the Government does not dispute except on the ground that the facts did not support the court's findings—arises from the effort of the Director to enforce taxes against the corporation by coercion of its stockholders to pay the corporation's supposed indebtedness. The Director did not assess the tax against the stockholders or the partnership, but confined his effort to an attempt to reach the assets of those not made parties to the assessment or brought into this action, by this indirect proceeding aimed at collecting the money from those held by the court not to be liable for it.

We do not find any case decided by the Supreme Court or by this Court denying injunctive relief under facts approximating those justifiably found by the trial court as present in this case. All of the tests requirements of *Miller* v. *Standard Nut Margarine Co., supra,* were met by the proof and the findings of

the court; and we think, moreover, that the injunction was justified under *Allen, Collector of Internal Revenue* v. *Regents of the University System of Georgia,* 1938, 304 U.S. 439, where it is said, at pages 448–449: "The dispute as to the propriety of a suit in equity must be resolved in the light of the nature of the controversy. * * * These extraordinary circumstances we think justify resort to equity. What we have said indicates that R.S. 3224, *supra* [now § 7421], does not oust the jurisdiction. The statute is inapplicable in exceptional cases where there is no plain, adequate, and complete remedy at law. This is such a case, for here the assessment is not of a tax payable by respondent but of a penalty for failure to collect it from another." The facts here bring this case closely in line with that case, as well as *Hill* v. *Wallace,* 1922, 259 U.S. 44, 62; *Dodge* v. *Brady,* 1916, 240 U.S. 122; and *Lassoff* v. *Gray,* 6 Cir., 1959, 266 F. 2d 745, and the cases therein listed at page 746.

Based upon the published opinion of the court below, supplemented by these comments, the judgment appealed from is

Affirmed.

RIVES, *Circuit Judge,* Dissenting:

This suit seems to me one to restrain the collection of a tax clearly prohibited by Section 7421(a) of the 1954 Internal Revenue Code.[1] Admittedly, the suit does not fall within the express exceptions

[1] "§ 7421. *Prohibition of suits to restrain assessment or collection*

"(a) *Tax.*—Except as provided in sections 6212 (a) and (c), and 6213(a), no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court." 26 U.S.C.A. § 7421.

which relate to insufficiency of the notice of deficiency provided in Sections 6212 (a) and (c), and 6213(a). Under familiar rules of construction, the statute having provided express exceptions to its prohibition, it would seem that implied exceptions are excluded. However, both the learned district judge and the majority of this Court feel that implied exceptions are provided by *Miller* v. *Standard Nut Margarine Company*, 1932, 284 U.S. 498, and that this suit falls within such exceptions. With deference, I disagree on both scores.

The courts have been prohibited from entertaining suits for the purpose of restraining the assessment or collection of any tax since 1867.[1] The rationale and philosophy of that prohibition was first clearly stated in *Cheatham, et al.* v. *United States*, 1875, 92 U.S. 85, 89:

> "If there existed in the courts, State or National, any general power of impeding or controlling the collection of taxes, or relieving the hardship incident to taxation, the very existence of the government might be placed in the power of a hostile judiciary. *Dows* v. *The City of Chicago*, 11 Wall. 108. While a free course of remonstrance and appeal is allowed within the departments before the money is finally exacted, the general government has wisely made the payment of the tax claimed, whether of customs or of internal revenue, a condition precedent to a resort to the courts by the party against whom the tax is assessed. In the internal-revenue branch it has further prescribed that no such suit shall be brought until the remedy by appeal has been tried; and, if brought after this, it must be within six months after the decision on the appeal. We regard this as a condition on

[1] March 2, 1867, c. 169, § 10, 14 Stat. 475.

> which alone the government consents to litigate the lawfulness of the original tax. It is not a hard condition. Few governments have conceded such a right on any condition. If the compliance with this condition requires the party aggrieved to pay the money, he must do it. He cannot, after the decision is rendered against him, protract the time within which he can contest that decision in the courts by his own delay in paying the money. It is essential to the honor and orderly conduct of the government that its taxes should be promptly paid, and drawbacks speedily adjusted; and the rule prescribed in this class of cases is neither arbitrary nor unreasonable."

Since then that reasoning has been often repeated.[3] If a fair and adequate administrative remedy is provided, due process does not require an opportunity for judicial review of tax liability.[4] The suit in the present case was filed only after the Appellate Division had "carefully considered your claims for abatement of employment taxes as listed below and the information furnished by your representatives," and had "concluded that there is no overassessment of employment taxes." While the result is questioned, there has been no contention or holding that such review does not constitute a fair and adequate administrative remedy.

Properly interpreted, *Miller* v. *Standard Nut Margarine Company, supra,* is not an attempt of the judiciary to emasculate by implied exceptions the clear and explicit prohibition of jurisdiction contained in the statute. The theory of that case is that the exaction was not a true tax, but simply an "attempted

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[3] E.g., Graham v. duPont, 1923, 262 U.S. 234, 254, 255, and the cases there cited.

[4] Anniston Manufacturing Co. v. Davis, 1937, 301 U.S. 337, 342, 343.

exaction by a tax official under the guise of an assessed tax." That theory was thus stated by Judge Walker for this Court,[4] and was explicitly adopted by the Supreme Court:

> "And this court likewise recognizes the rule that, in cases where complainant shows that in addition to the illegality of *an exaction in the guise of a tax* there exist special and extraordinary circumstances sufficient to bring the case within some acknowledged head of equity jurisprudence, a suit may be maintained to enjoin the collector." (Emphasis supplied.)

Miller v. *Standard Nut Margarine Company*, 1932, 284 U.S. 498, 509.

That *Miller* v. *Standard Nut Margarine Company* presented such an exceptional case as to amount to an abuse of jurisdiction by the tax officials is made apparent in the extended and able analysis of that case in *Homan Mfg. Co.* v. *Long*, 7 Cir., 1957, 242 F. 2d 645, 651–653. In no other case has the Supreme Court permitted an injunction to restrain the assessment or collection of a tax. The cases are collected and discussed in 9 Mertens Law of Federal Income Taxation, Zimet Revision, Section 49.212, where it is stated:

> "With just one exception, those cases in which the Supreme Court has permitted injunctions restraining Government officials were all cases in which the Court held that the purported tax sought to be restrained was in reality not a tax but a penalty, and the Court said that the statutory prohibition did not apply to the collection of penalties. The decision in Miller v. Standard Nut Margarine Company is the only case in which the Supreme Court clearly held that although no penalty was involved, the circumstances were so special and

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[4] Miller v. Standard Nut Margarine Co., 5 Cir., 1931, 49 F. 2d 79, 84.

extraordinary as to render inapplicable the statute prohibiting the maintenance of a suit to restrain the collection of taxes."

The rationale of *Miller* v. *Standard Nut Margarine Company, supra,* cannot be extended to bring within some supposedly implied exception cases like the present one without emasculating the prohibition contained in the statute. That much was recognized by Judge Sanborn, speaking for the Eight Circuit, in a case which seems to me directly in conflict with the holding of the majority in the instant case:

"It is true that where a complainant demonstrates that what purports to be a tax is merely an exaction in the guise of a tax and that there are special and extraordinary circumstances which bring the case under some acknowledged head of equity jurisprudence, a suit may be maintained to enjoin the collection of the pseudo-tax. Miller v. Standard Nut Margarine Co., 284 U.S. 498, 509, 52 S. Ct. 260, 76 L.Ed. 422. The validity of the taxing act under which the assessments against appellant were made has been sustained. Steward Machine Co. v. Davis, 301 U.S. 548, 57 S.Ct. 883, 81 L.Ed. 1279, 109 A.L.R. 1293; Helvering v. Davis, 301 U.S. 619, 57 S.Ct. 904, 81 L.Ed. 1307, 109 A.L.R. 1319. The assessments are for taxes, and not for exactions in the guise of taxes. The appellant may not owe them, but that does not change their nature, nor is nonliability a special or extraordinary circumstance. This case presents the ordinary situation of a taxpayer resisting payment of taxes which he believes that he does not owe. That the appellant is in poor financial condition, that it will be a hardship upon him to pay the taxes and sue for their recovery, that to compel him to pay them threatens ultimate ruin to his business, and that a court of Iowa has ruled

> that appellant was not an employer of the drivers of his cars and was not liable for contributions under the Iowa Unemployment Compensation Law, Chap. 77.2, Code of Iowa, 1939, §1551.07, et seq., we do not regard as 'special and extraordinary circumstances' which would justify the maintenance of this action to enjoin the collection of these taxes."

Kaus v. *Huston*, 8 Cir., 1941, 120 F. 2d 183, 185. See also, *Homan Mfg. Co.* v. *Long*, 7 Cir., 1959, 264 F. 2d 158, 160.

In the present case, the taxes are not attacked as themselves unconstitutional or illegal, nor is any question raised as to the good faith of the tax officials in assessing the taxes against the plaintiff. Instead, the question is closely and hotly litigated purely as a question of fact, thus stated by the district court:

> "The main question posed for solution is whether or not the captains and crewmen who performed fishing services aboard trawlers of which the plaintiff was the owner or the lessee, were employees within the meaning of Sections 1426 and 1607 of the Internal Revenue Code of 1939, 26 U.S.C. A. §§ 1426, 1607, and Sections 3121 and 3306 of the Internal Revenue Code of 1954, 26 U.S.C.A. §§ 3121, 3306. If the relationship of employer-employee existed then the tax was properly assesed. If the relationship of employer-employee did not exist, then the levy was unlawful."

Williams Packing & Navigation Co. v. *Enochs*, S.D. Miss., 1959, 176 F. Supp. 168, 170.

This is a more extreme application of *Miller* v. *Standard Nut Margarine Company, supra*, than has ever before been countenanced by this Circuit.* Very

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* See for example, United States v. Curd, 5 Cir., 1958, 257 F. 2d 347, 350; Enochs v. Green, 5 Cir., 1959, 270 F. 2d 558, 561; McDonald v. Phinney, 5 Cir., 1961, 285 F. 2d 121, 122.

clearly, I submit, this case is not one of an illegal exaction in the guise of a tax.

Just as clearly, the case is not brought within the second requisite of the rule, viz., "special and extraordinary circumstances sufficient to bring the case within some acknowledged head of equity jurisprudence." *Miller* v. *Standard Nut Margarine Company, supra,* 284 U.S. at 509. Equity may enjoin vexatious litigation not brought in good faith but instituted for annoyance and oppression. 43 C.J.S., Injunctions, Sec. 39; 28 Am. Jur., Injunctions, Sec. 210. I know of no case, however, permitting an injunction merely upon the basis of financial hardship, and so to do would be an obvious unequal application of the law to the poor and to the rich.

Further, under the facts and circumstances of this case, the taxpayer should not be permitted to establish irreparable damages by hiding behind the corporate fiction, when for all practical purposes, including financial, the taxpayer corporation and the De Jean partnership were parts of an integrated operation under the control and direction of the same two individuals. *Southern Pacific Co.* v. *Lowe,* 1918, 247 U.S. 330.

I therefore respectfully dissent.

JUDGMENT

Extract From the Minutes of June 14, 1961

J. L. ENOCHS, DISTRICT DIRECTOR OF INTERNAL REVENUE *v.* WILLIAMS PACKING & NAVIGATION CO., INC.

No. 18272

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Mississippi, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from in this cause be, and the same is hereby, affirmed.

"RIVES, *Circuit Judge*, Dissenting."

APPENDIX B

UNITED STATES DISTRICT COURT, S. D. MISSISSIPPI, JACKSON DIVISION

Civ. A. No. 2690

WILLIAMS PACKING & NAVIGATION CO., INC., v. J. L. ENOCHS, DISTRICT DIRECTOR OF INTERNAL REVENUE

July 3, 1959

MIZE, *District Judge.*

This is a controversy between the Williams Packing & Navigation Co., and J. L. Enochs, District Director of the Internal Revenue and arises as a result of a determination of the Commissioner of Internal Revenue that the persons upon whose compensation the taxes involved were assessed were employees of the plaintiff within the meaning of the Federal Insurance Contributions Act and the Federal Unemployment Tax Act. An assessment was made by the director against the plaintiff for the years 1953, 1954 and 1955 in the total sum of $41,568.57. The main question posed for solution is whether or not the captains and crewmen who performed fishing services aboard trawlers of which the plaintiff was the owner or the lessee, were employees within the meaning of Sections 1426 and 1607 of the Internal Revenue Code of 1939, 26 U.S.C.A. §§ 1426, 1607, and Sections 3121 and 3306 of the Internal Revenue Code of 1954, 26 U.S.C.A. §§ 3121, 3306. If the relationship of employer-employee existed, then the tax was properly assessed.

If the relationship of employer-employee did not exist, then the levy was unlawful.

The corporation leases boats to a captain who employs his own crew and each captain has complete control over the boat and crew and no right of control is reserved by the corporation. The captain and crew determine when they shall depart for fishing waters and where to go. The catch is returned and sold, and the proceeds are divided up by the captain after one share is deducted for the boat.

This case, like so many other cases, depends upon the individual facts as brought out here and not upon methods of other similar concerns engaged in like business. No uniform pattern covering the entire United States can be formulated except where the facts are identically the same. The judgment to be rendered in this case must be determined from the facts of this particular case, including all the exhibits and reasonable inferences therefrom and the conduct of the parties so far as it may have probative force upon the issues. The law must be determined from the Acts of Congress, the judicial interpretations by the courts and the Treasury Regulations insofar as the Treasury Regulations are made within the scope of the powers granted to it by Congress.

The record is a lengthy one and there are some conflicts in the testimony, but on the whole the testimony is practically undisputed as to the manner in which the plaintiff conducts its business. The plaintiff, Williams Packing & Navigation Co., Inc., is a Louisiana corporation and was organized in June of 1944 and granted a charter by the State of Louisiana and is qualified to do business in Mississippi. Elmer Willams, Carroll Williams, Jr., and Lucius Frieberger, citizens of Mississippi, were the incorporators, with Elmer Williams, president, owning nineteen shares,

Carroll Williams, Jr., secretary-treasurer, nineteen shares, and Lucius Frieberger two shares. The purpose of the corporation was to engage in the seafood packing business, to own, operate, lease, manage and control boats, machinery, appliances and tackle for the purpose of engaging in the fishing operations, fishing for, dredging and catching oysters, shrimp, crabs and other species of fish.

It has operated under its charter continuously from year to year since the date of its incorporation and is a bona fide corporation existing under the laws of the State of Louisiana. It was not organized for the purpose of evading the payment of any taxes of any type and at the time of its incorporation, as well as now and continuously since its incorporation, was to engage in a legitimate business, which it has done. If it were to operate for oysters in the waters of the State of Louisiana it was necessary and imperative that it incorporate in that state, insofar as oysters were concerned. Other than catching shrimp, oysters and other fish in the State of Louisiana, its principal place of business is at Biloxi, Mississippi. In the conduct of its business it leased the greater part of the time from the DeJean Packing Company, a partnership, some eighteen or twenty shrimp trawlers, and in March, 1952 bought from the DeJean Packing Company two additional fishing vessels which were built by the DeJean Shipyard Company in Biloxi. These two vessels were resold in 1957 to the DeJean Packing Company.

Elmer Williams, the president of the corporation, is the General Manager, including business manager and looking after the details of carrying on the work, particularly within the past few years. Carroll Williams, Jr., at the time of the trial of the lawsuit, was in bad health and had been for several years, but partici-

pated in the discussions frequently with Elmer as to the methods of carrying on the business. Lucius Frieberger was and is the bookkeeper and attends to the major part of the office details of the business. A fairly accurate set of books is kept on behalf of the corporation, but because of the nature of the business not such a set of books as could be characterized as a full and complete set of records. Among other things that Frieberger keeps is an account of the trip expenses for each boat and the catch made by each boat. He handles the financing and banking details of the corporation, issues the checks to the captains of the boats after having computed how much is due for a catch and turns the check over to the captain, who cashes it and pays off the men employed by the captain to assist him in the operation of the boat.

It has been the custom on the Coast of Mississippi since the seafood packing industry started that fishing vessels have operated upon a share or lay basis, but the details of this customary way varied between some of the packers and that is the reason that it is necessary to determine how the corporation in this particular case conducted its business.

This corporation retained no control over the captain or his men after a vessel had been let to a captain upon his application for a boat or to one selected by Elmer Williams and picked by him to operate the boat. There was no fixed time usually for which a boat would be let to a captain. Occasionally it would be for a trip, but usually and customarily for a season. Elmer Williams, the president, the record shows, knew practically all of the fishermen along the Coast of Mississippi and knew the capable and competent ones to whom he safely could entrust a boat owned by the corporation or leased by it and they would reach an agreement by which the boat would be

let to the captain for either trips or for the season. The corporation, acting through Elmer Williams, reserved no right of control over the captain, but leased or let the boat to the captain with the distinct understanding that the captain would hire all of his men or helpers and could fire them without any right whatsoever on the part of the corporation to hire or fire any of the employees of the captain. The transaction partook very much of the nature of a contract. The corporation could not fire the captain, but if the captain were guilty of a breach of a contract, just as in any other contractual relationship, the inference is from the testimony that the corporation could then require the captain to return the boat because of a breach of contract, but not because of any retained right of control over the captain.

When the captain takes possession of the boat he takes the papers to the office of the Bureau of Customs, where he obtains the necessary statutory endorsement on the papers as captain of that boat. Then it is that the captain employs the number of fishermen necessary to complete the crew as may be determined by the captain; in the industry here on the Coast the crew is usually two for shrimping and four for dredging oysters. A voyage may last from ten days to two weeks, depending upon the weather and the type of seafood for which they are looking. The boat and crew are then completely under the supervision and control of the captain, who leaves port when he desires, fishes where he pleases and returns when he pleases. The captain procures the fuel, groceries and ice, and determines for himself the amount that will be needed for his voyage. The captain may purchase his fuel and groceries wherever he desires, but usually purchases his fuel at the DeJean docks and his groceries at the grocery store of

Leon Hall. Leon Hall is the son-in-law of Elmer Williams and operates successfully a grocery store.

The testimony shows that the captains of these boats purchased a great part of their groceries during the years involved from Leon Hall, but not because he is a son-in-law of Elmer Williams; it is because of his efficiency and accommodation in delivering groceries to the boats, rather than having the captain and crew go to a grocery store to purchase their own groceries and make delivery themselves. Leon Hall charges groceries to the account of the boat captain or to the boat, makes deliveries, and if he does not have the groceries in his own store, will send out and get them. He is conveniently located to the boats and it easily can be seen why the captains patronize a store of this type. Their patronage is not due to any coercion whatsoever upon the part of Elmer Williams or of the corporation. The captains usually obtain their equipment from the DeJean Packing Company and their ice from the Biloxi Freezing Company. The ice blocks, which are delivered to the docks for loading, are reduced to size for boat use by an ice crusher located at the DeJean docks. Elmer Williams is a partner in the DeJean Packing Company and is vice-president and a stockholder in the Biloxi Freezing Company and, while an uneducated man, yet he is a successful business man, very energetic and accommodating. It is because of the convenience and accommodation that the captains of the various boats have in this set-up that they patronize these other industries or businesses in which Elmer Williams is interested. It is not because of any reserved control, right of control or coercion on the part of the corporation or Elmer Williams.

As hereinabove stated, the purpose and business of the corporation is to catch and sell seafoods with boats either owned by them or leased by them. The captains usually sell their output or catch to the DeJean Packing Company, but there is no requirement that they so do. They are at liberty, if they can get a better price than offered by DeJean, to sell their catch when and where they please. When one of these boats comes in with a catch it usually docks at the DeJean docks where the catch is sold, and if sold to DeJean, the catch is unloaded on a conveyor system at the docks and on this conveyor system ultimately is weighed and then moved into the processing operations of DeJean Packing Company, DeJean Packing Company being engaged in the processing of seafood. A record is made of the weight of the catch, given to the captain, who takes it to Lucius Frieberger, who totals up and calculates the amount of money the catch represents. Frieberger adds up the trip expenses, including the fuel, groceries and ice, etc., and then these expenses are deducted from the value of the gross catch and the net cash is divided between the captain and his crew, one share going to each, one share going to the boat (generally known as the boat share), and one share goes for the rig until the rig is paid for. The check is made payable to the captain, who makes the distribution.

There is another feature shown by the record to the effect that if a trip is unsuccessful it is generally called a broker, and means that no catch was made where the value of the catch is sufficient to cover the cost of the trip. Under these circumstances the unpaid cost of the trip is carried forward to succeeding trips to be deducted from subsequent catches before any subsequent disbursements are made to the fishermen on these subsequent catches. It occurs oc-

casionally under these circumstances that the corporation may advance money to the fishermen out of its own general fund with the expectation of being repaid. This is no requirement by the terms of the contract, but simply a gratuity on the part of the corporation, I would say, in order to maintain the good will of the fishermen. If one of the fishermen on such a broker is not employed again by a captain, then the corporation simply loses that amount of money.

The defendant introduced in evidence certain hospital records of the Marine Hospital at New Orleans, which contained statements made by the corporation against interest, and possibly it brought out other statements against interest. Likewise, the plaintiff points to the conduct of the Government in indicting the Fishermen's Union, charging that they were not employees, and in that case, in the prosecution of the indictment, contended and urged that the fishermen were not employees. These statements against interest are admissible in evidence and competent to the issues, and in this case were considered by the court along with all the other evidence in reaching a judgment herein. However, statements against interest made by a party are not conclusive, but are only to be considered as a part of the evidence, along with all the other facts in the case, and after so being considered, it is then the duty of the court to determine the actual facts. See 31 C.J.S. Evidence §§ 377, 378 and 379, pp. 1161 to 1164.

The investigation of the Internal Revenue Service was commenced in March, 1956 and on July 17, 1956, formal notice was given to the corporation and demand made for the payment of the taxes. On September 5, 1957, the corporation filed this suit seeking permanently to enjoin the collection of the tax on

the ground that it was illegally assessed and that to be required to pay that large amount of money would wreck and ruin the corporation, and were such unusual circumstances because of its illegality and the inability of the corporation to pay, that an injunction was warranted, notwithstanding Section 7421(a) of the Internal Revenue Code of 1954, 26 U.S.C.A. § 7421(a), which provides that no injunction shall issue restraining the assessment or collection of a tax. As a matter of law, it is a rare case where an injunction will issue, but where the tax is illegal and there exists some unusual and extraordinary circumstance, then it is appropriate to grant injunctive relief. The corporation has always assumed that it was not liable for taxes of this nature for the reason that the relationship of employer and employee did not exist, and prior thereto no contention by the Government had been made to it. It alleged that being suddenly called upon to pay $41,568.57 was more than it could do. I find as a fact that if the levy had been made upon the assets of the corporation it would have wrecked the corporation and thrown it into bankruptcy, as it did not have and does not have assets with which to pay the taxes and not sufficient assets with which it could have negotiated a loan to pay the tax.

It was the theory, and is the theory, of the Government that the DeJean Packing Company is able to pay the tax and that because of the relationship of Elmer Williams to the corporation and to the partnership that the corporation had it within its power to require the DeJean Packing Company to pay the tax for it if the corporation be liable. However, as heretofore stated, this contention is not sustained by the evidence. The record clearly shows that the DeJean Packing Company is completely a separate and

independent entity from that of the corporation and the DeJean Packing Company is under no duty or requirement of law to pay the tax for the corporation. It is a partnership composed of Elmer Williams and his wife, and Carroll Williams and his wife.

The corporation is engaged only in production of raw materials and sells practically all of its product to the DeJean Packing Company. At the time of the filing of the suit it owned two vessels worth approximately twenty-one or twenty-two thousand dollars, and its only assets of any value were the leasehold interest it had upon boats and the good will and value of its right to fish in the waters of Louisiana. The balance sheet of the corporation shortly before the suit was filed showed that it had a deficit of approximately $300, and the record shows that from time to time there were overdrafts and on other occasions where it had a fairly good bank account, but not sufficient to pay the sum of $41,568.57 in a lump sum, and, as before stated, if the Government had been permitted to execute upon the property and seize and sell it, it would totally wreck and ruin the corporation. The corporation is entitled to continue its existence because its charter has value and gives it valuable rights in Louisiana, and as long as it complies with all the federal laws it should not be permitted to be destroyed.

The burden of proof, of course, is upon the corporation to show that it was an unusual hardship to be required to pay an illegal tax, and in this case it has so shown by the burden of proof that to pay the illegal tax would put it out of business.

The Government complains of bad faith on the part of the plaintiff and concealment of evidence. The court finds as a fact that the plaintiff was not guilty of any bad faith or any intentional concealment of

any records or evidence. The record does show that some of the documents requested by the Government and ordered to be furnished by the court were not delivered within the time directed by the court, but it was due to the inability of the plaintiff to locate these documents—not to intentional conduct on the part of the plaintiff—and when they were located they were furnished to the defendant and the court gave the defendant ample opportunity for full examination of all documents they desired to look at.

I find as a fact that the relationship of employer and employee as defined by the Social Security Act, 42 U.S.C.A. § 301 et seq., did not exist and does not exist between the corporation and the captains of the boats and the crewmen, and that the tax was illegally and unlawfully levied, and that to have permitted the director to proceed to levy upon the property of the corporation would have destroyed the business of the corporation and completely wrecked it and worked an unusual and extraordinary hardship upon the corporation, and under these circumstances the temporary injunction was properly issued and should be permanent.

Counsel for plaintiff and defendant have filed elaborate briefs, which have been very helpful to the court and which have cited many authorities, but it will not be necessary to refer to each particular authority cited by the respective parties and to do so would unduly prolong this opinion.

The law is well settled that if a tax has been levied and demanded that is illegal and the alleged taxpayer cannot pay it without undue hardship and that the circumstances are unusual, he then is entitled to an injunction. See Midwest Haulers v. Brady, 6 Cir., 128 F. 2d 496; John M. Hirst & Co. v. Gentsch, 6 Cir. 133 F. 2d 247. It is well settled that under ordinary

circumstances an injunction will not issue, but that an alleged taxpayer who disputes the liability of the tax must pay it and sue for recovery of it. This principle needs no citation nor authority. Likewise, hardship placed upon an alleged taxpayer does not justify the issuance of an injunction. See Reams v. Vrooman-Fehn Printing Co., 6 Cir., 140 F. 2d 237. On the other hand, where it is shown that the tax is illegal and that there are exceptional and extraordinary circumstances, then it is appropriate to grant an injunction. See Miller v. Standard Nut Margarine Co., 284 U.S. 498, 52 S. Ct. 260, 76 L. Ed. 422; United States v. Curd, 5 Cir., 257 F. 2d 347. See also United States Mutual Benefit Ass'n v. Welch, 6 Cir., 268 F. 2d 201.

I therefore conclude as a matter of law that it was appropriate to grant the temporary injunction.

Having found as a fact that the relationship of employer-employee did not exist, it is not necessary to determine what the relationship of the parties really is, but apparently, insofar as the corporation and the captains are concerned, it is the relationship of lessor and lessee or joint adventurers, as was claimed by the Government, in the Gulf Coast Shrimpers and Oystermans Association v. United States, 5 Cir., 236 F. 2d 658, or that of independent contractors. The crewmen were employed by the captain, or joint adventurers with him. It is not necessary to discuss all the authorities that have been cited by the plaintiff and the defendant touching upon the relationship of the parties. It is sufficient to cite the cases of Bartels v. Birmingham, 332 U.S. 126, 67 S. Ct. 1547, 91 L. Ed. 1947; United States v. Silk (Harrison v. Greyvan Lines), 331 U.S. 704, 67 S. Ct. 1463, 91 L. Ed. 1757; and Gulf Coast Shrimpers and Oystermans Association v. United States, 5 Cir., 236 F. 2d 658, and the authorities that were cited by the court in these decisions.

I shall not undertake to differentiate all the cases cited by the defendant and relied upon by him, but simply call attention to the fact that each particular case is governed by its own facts. The case of Maryland Casualty Co. v. Grant, 39 Ga. App. 285, 146 S.E. 792, a Georgia case, is easily distinguishable from the facts in the instant case. To a certain point the facts are the same, but at the crucial point the facts are different. In that case the canning company reserved the right to fire the captain operating the boat at any time it desired and without cause, and giving a liberal construction to the Workmen's Compensation Act of Georgia, the court held that the captain was an employee of the canning company rather than an independent contractor. Southern Shell Fish Company v. Plaisance, 5 Cir., 196 F. 2d 312, is a case wherein the court held that it was properly submitted to the jury to determine an issue of fact as to whether the plaintiff in that case was an employee of the Southern Shell Fish Company or of the vessel's captain as an independent contractor of the vessel, and that the record showed that there was evidence that would support either theory. In that case there also was an additional circumstance of insurance coverage, which is a circumstance to be taken into consideration in determining whether the relationship of employer-employee exists or that of an independent contractor. See Finkbine Lumber Co. v. Cunningham, 101 Miss. 292, 57 So. 916.

These examples of the authorities simply illustrate the point that each case will be determined by the facts of the particular case and that no general pattern can be established or formulated. The record in the Gulf Coast Shrimpers and Oystermans Association case, supra, well demonstrates that fact and the fact that all the packers on the Coast of Mississippi

do not have identical patterns. In that case it was shown by one of the packers that he paid Social Security on his employees and retained sufficient control over the operations of the captains as would make them employees. On the whole, however, as shown in that case, the relationship of employer-employee does not exist and it was so contended by the Government in the case. While the Government is not estopped by taking a contrary position, yet the contention of the Government at that time is very persuasive, and the judgment of the court and the opinion of the Supreme Court denying certiorari establishes that the relationship of employer-employee did not exist. The court, during the trial, declined to submit the issue to the jury and in the absence of the jury agreed with the contention of the Government and found as a fact that the relationship of employer-employee did not exist and stated that if it did exist, then the defendants would be entitled to a directed verdict, but declined and refused instructions requested by the defendants to submit it to the jury. This action of the trial court was affirmed.

It is not necessary to give the history of the present act of Congress, but suffice it to say that the act as it finally came out of the Congress defined an employee to mean "any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an employee". It is, therefore, clear that Congress adopted the definition of an employee to be that as understood under the common law realistically applied, in determining whether the relationship of employer-employee existed. The various cases construing the act prior to 1948 were discussed in the report of Senator Milliken from the committee on finance, and Congress finally adopted the definition above quoted.

Applying the common-law rule, it is clear in this case as a matter of law that the relationship of employer-employee does not exist between a corporation engaged in the business that the plaintiff is and the captains of the boats as shown in this particular record. No one criterion can be announced that will define and determine that relationship, but the right of control is one of the important elements. In determining what the common law is, the decisions of the federal courts rather than of the various states must be looked to in order to determine what it is. Treasury Regulation 107, Sec. 403.2045 recognized this doctrine. The Treasury Regulations have the force of law where they are within the perimeter of the Acts of Congress. If they exceed the authority granted by Congress, then, of course, they are without weight.

The defendant in this case contends that the corporation in this case is a sham and a shell and that its corporate existence and charter may be entirely disregarded, and cites the case of Gregory v. Helvering, 293 U.S. 465, 55 S. Ct. 266, 79 L. Ed. 596; Higgins v. Smith, 308 U.S. 473, 60 S. Ct. 355, 84 L. Ed. 406. Under the facts of the present case those authorities are not applicable, but, on the other hand, the facts of the present case bring it within the doctrine of Moline Properties v. Commissioner, 319 U.S. 436, 63 S. Ct. 1132, 87 L. Ed. 1499, and as announced in that case the corporation is one that was organized for a legitimate purpose and authorized by applicable law.

I conclude as a matter of law that the tax was illegally assessed and that the granting of the injunction was appropriate and that the injunction should be made perpetual.

An order may be drawn in accord herewith.

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